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IN THE

Supreme Court of the United States

October Term, 1957

No. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS, deceased,

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA, *et al.*; THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLAUDE PEPPER
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The respondents in their brief have shown no basis in the record for the holding by the Supreme Court of Florida, affirming the lower Court, that the construction of the overpass which has caused the petitioners the damage complained of in this case was not built to accommodate the expansion program of the St. Joe Paper Company, the abutting owner, on the opposite side of the road from petitioners.

The testimony of District Engineer George L. Dickenson partially quoted on page four of respondents' reply to the petition, is not to the contrary.

First, the Road Department speaks only through resolution of its governing Board recorded in its minutes. No action of the State Road Department officially taken to build an overpass over the two original tracks on account of any hazard of such crossing to the travelling public is shown anywhere by respondents in the record.

On the contrary, pursuant to the entreaty of Sharit for the Paper Company on January 18, 1952 (A. 85), to the Road Board to build the overpass so that it could occupy the highway and the land on the other side of it for its expansion program; pursuant to the further petition of Sharit for the Paper Company to a Road Board member, Simpson, in January of 1953, again for the Road Department to build the overpass to accommodate the Paper Company's expansion program; and pursuant to the further urging of Sharit for the Paper Company that the Road Department build the overpass to accommodate the Paper Company on January 30, 1953 (A. 91), the State Road Department acceded to the Paper Company's request and adopted its tentative budget for 1953 providing for an overpass at a cost of $300,000.00. (See exhibit attached to petitioner's Petition of May 18, 1957 to the Supreme Court of Florida to Remand Cause for the Taking of Further Evidence, filed with our petition for certiorari.) Up until that time the record is completely silent that Dickenson, Hopkins (the Engineer of Federal Aid), Dean (the Assistant Highway Engineer), or Hankins (another of respondents' witnesses in the lower Court), had entered the picture at all. And it should also be emphasized that Dick-

enson did *not* testify that the plan to build the overpass was not the result of the constantly reiterated importunities of the Railroad and Paper Co.

Obviously, this tentative budget became the final budget of the Road Department approved on February 26, 1953 (A. 67), which allocated sufficient funds to construct an overpass to clear *thirteen* tracks, and this approval of the tentative budget on January 30, 1953 by the State Road Department in response to the appeal by the Paper Company became the first official action of the Road Department authorizing the overpass.

Moreover, the record is silent in fact as to any traffic count or to any inquiry as to whether the pre-existing two-track crossing constituted a hazard. Indeed it was only after the Road Department considered the laying of the *additional* tracks that it determined that the contemplated crossing would constitute a hazard. (A. 67). And it was only after the State Road Department had resolved to build the overpass to accommodate the Paper Company and the Paper Company's Railroad submitted in detail plans as to the location of the tracks and their clearance, that the Federal Aid authorities determined that the Paper Company must pay all the cost of the overpass that would not have traversed the two original tracks if it had so been built.

After the State Road Department had resolved to build the overpass to accommodate the Paper Company, then the State Road Department sent official authorization to the Paper Company and to the Railroad to build the totally new track lay-out on October 21, 1953 (A. 113), and the State Road Department on October 30, 1953, ad-

vised counsel for the petitioners that the granting of such authority was "the first step toward the *erection* of the overpass." (A. 115). (Emphasis supplied).

What else could the Road Department have done but detour the road or build an overpass to accommodate the expansion program of the Paper Company as Sharit for the Paper Company requested of the Road Board on January 18, 1952 (A. 85) in view of the finding of the Special Master as to the following effect the expansion program of the Paper Company would have upon the character of the crossing?

> "It is anticipated that there will be at least *100 train crossings per day on account of the expansion program recently completed by the St. Joe Paper Co.* . . . which would make the crossing extremely dangerous for the traveling public." (A. 23). (Emphasis supplied).

It was the Paper Company's expansion program, not the increase in the volume of the travelling public, that made the crossing hazardous and required the building of the overpass. The Court need only examine the clear chronology of events in this case (A. 65-71) to come to the obvious conclusion that the Paper Co.'s expansion program was the proximate cause of the action taken by the Road Department which in turn was the proximate cause of the damage suffered by petitioners.

Hence, as we said in our original Petition, this is simply a case where the State Road Department used its authority to build and regulate the public highways to accommodate one abutting owner to its great benefit but to the ruin of the abutting owner across the road.

The principles of justice require that in such case the injured party be compensated.

Respondents' arguments on the points of law involved in this case are plainly irrelevant to the central issue, which is whether the Road Department authorized the construction program in question for the purpose of accommodating the private respondents, and if so, whether such action is violative of petitioners' rights under the Fourteenth Amendment. Respondents beg the question when they aver that the Road Department acted "within its lawful authority", for that is the very matter in dispute. Moreover, respondents' arguments concerning the matter of compensation for consequential injuries is beside the point, for those arguments assume that the damages suffered were consequent to a lawful taking for a *public* and not a *private* purpose. Finally, that this Court will review the record on certiorari is clear not only from *Norris v. Alabama*, 294 U.S. 587; 55 S.Ct. 579; 79 L.Ed. 1074 (1935), cited in our petition, but also from the very recent case of *Ferguson v. Moore-McCormack Lines*, 352 U.S. ___, 1 L.Ed.2d. 511, 77 S.Ct. ___ (1957).

Respectfully submitted,

CLAUDE PEPPER
Counsel for Petitioners

, 1957.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioners' Reply to Respondents' Joint Brief in Opposition To Petition for Writ of Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, been served by mail upon MEGINNIS, THOMPSON & MORRISON, 123½ South Monroe Street, Tallahassee, Florida, attorneys for respondents, St. Joe Paper Co. and Apalachicola-Northern Railroad, and to BRYAN W. HENRY, Holland Building, Tallahassee, Florida, attorney for respondent State Road Department of Florida, this _____ day of _____, 1957.

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CLAUDE PEPPER